

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	§	
	§	
Petition of UTEX Communications	§	
Corporation, Pursuant to Section	§	
252(e)(5) of the Communications	§	WC Docket No. 09-134
Act, for Preemption of the Jurisdiction	§	
of the Public Utility Commission of	§	
Texas Regarding Interconnection	§	
Disputes with AT&T Texas	§	

**Public Utility Commission of Texas' Opposition to  
UTex Communication Corp.'s Motion for Reconsideration**

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**I. Summary**

The primary argument UTex presents in its motion for reconsideration — that preemption is required because the PUCT’s arbitration award ultimately *might* fail to address all issues, or the PUCT *might* decide it lacks authority to resolve certain issues (Reconsideration Point 1) — is based on several false premises.

**First**, the arbitrators’ proposal for award is just that — a *proposal* for award. UTex and AT&T have both recently filed exceptions to the proposal. There is no final award yet. Once there is a final award, UTEX and/or AT&T may ask the PUCT Commissioners to reconsider it, and the PUCT Commissioners themselves could change it. Regardless of the merits of UTex’s claims, they are obviously premature.

**Second**, UTex’s argument is not even based upon that proposal for award itself but on a mischaracterization of AT&T’s exceptions to it — the supposed “new facts” UTex alleges.

Review of AT&T's exceptions shows that AT&T does not, as UTEX says, contend that the PUCT has no authority to resolve certain issues. Instead, AT&T argues that the arbitrators got it wrong — that their proposed resolution of these issues is contrary to federal law and Commission authority. Thus, AT&T's exceptions present a question of *what terms federal law and Commission standards require in the agreement*, not a question of whether the PUCT has the power to decide the issues presented. The real issues involve what particular terms are to be set in an arbitration of an FTA Section 251/252 interconnection agreement and what, if any, terms are otherwise provided by tariff and federal law under the 47 U.S.C. § 251(g) “carve out.” UTex's motion for reconsideration assumes that the final PUCT decision would be based upon a position AT&T has not even taken.

**Third**, the potential determination UTex posits — that the PUCT may not give it all the contract terms it says it is entitled to — would not constitute a failure to act under 47 U.S.C. § 252(e)(5). UTex says that the PUCT might ultimately find that though the Commission has the authority to arbitrate particular contract terms, the PUCT does not have that specific authority. There is no basis for this assertion. In fact, as the proposal for award acknowledges, in its October 2009 order the Commission charged the PUCT with completing the UTex arbitration under “existing law” — the federal Telecommunication Act of 1996 (“FTA”) and the standards that the Commission has established.<sup>1</sup> The same law is applicable regardless of whether the

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<sup>1</sup> Tex. Util. Comm'n, *Petition of UTEX Communications Corporation for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act and PURA for Rates, Terms, and Conditions of Interconnection Agreement with Southwestern Bell Telephone Company*, Docket 26381 (Sept 23, 2010) (Proposal for Award) at 44; Memorandum Opinion and Order, FCC 09-2205, *In the Matter of Petition of UTEX Communication Corporation*, WC Docket No. 09-134 at 5-6 (rel. Oct. 9, 2009) (“October 2009 Order”).

PUCT, or the Commission, arbitrates the agreement. Nothing suggests the PUCT will somehow abdicate its responsibility to finish the arbitration. As the Commission found in its October 2010 order, it would be wasteful and inefficient for the Commission to take over the arbitration now, just as it is nearing completion.<sup>2</sup>

UTex's argument is fundamentally at odds with the FTA arbitration framework. The FTA sets up a scheme under which state commissions arbitrate interconnection agreements, applying federal law and Commission rules and decisions. Under the plain language of 47 U.S.C. § 252(e)(5), the Commission steps in and preempts only when a state commission has failed to act to carry out its responsibility to arbitrate. A party aggrieved by a state commission arbitration determination may ask a federal court to review it under 47 U.S.C. § 252(e)(6). Thus, if UTex does not get all the terms it says it is entitled to under the applicable existing law, its remedy is to go to federal court. But now that a proposal for award has been issued, UTex's renewed petition for preemption has morphed into an attempted end run around this FTA provision for federal-court review. The FTA does not give UTex or any party the option to choose whether to seek review of the PUCT's arbitration decision at the Commission or in federal court.<sup>3</sup> Nor does the FTA give UTex or any party a right to a second try — that is, to

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<sup>2</sup> Memorandum Opinion and Order, FCC 10-1920, *In the Matter of Petition of UTEX Communication Corporation*, WC Docket No. 09-134 at 3 (rel. Oct. 6, 2010) (“October 2010 Order”).

<sup>3</sup> UTEX denies in its motion for reconsideration that it is asking the Commission to take up an “appeal” of the PUCT's arbitration decision. Nonetheless, it asks the Commission to take over the arbitration, and therefore, substitute its determinations on all the issues for the PUCT's. UTex Motion for Reconsideration at 15 n. 20.

ask the Commission itself to arbitrate the agreement *again* — if a party is unhappy with the state commission’s determination.

None of UTex’s other reconsideration points have merit. In Reconsideration Point 2, UTEX complains that the arbitration will never be completed because it says AT&T’s alleged obstructionism will not allow it to ever be finished unless the Commission assumes jurisdiction. UTex presents no actual basis for this claim, other than various complaints about AT&T’s conduct. But none of these allegations suggest that the PUCT is not carrying out its responsibility to complete the arbitration. The Bureau’s October 2010 order implicitly rejected Reconsideration Point 3, clearly stating that the October 2009 order had not set a firm nine-month deadline by which the PUCT was required to complete the arbitration but instead established a reasonable time after which UTex was invited to refile to provide any additional facts relevant to its argument.<sup>4</sup> Reconsideration Point 4 mischaracterizes the Commission’s order, which established no precedent for extending the schedule in arbitrations involving “hard,” “unsettled,” and “complicated” issues. Finally, Reconsideration Points 5 and 6 are simply a repackaging of groundless Reconsideration Point 1.

## **II. The PUCT is acting to carry out its responsibility.**

The Commission has now twice found that the PUCT is acting to carry out its responsibility with regard to the UTex arbitration.<sup>5</sup> Most recently, the Commission stated in its

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<sup>4</sup> October 2010 Order at 2.

<sup>5</sup> October 2009 Order at 4-5; October 2010 Order at 2-3.

order denying UTex's renewed petition that the "PUCT has been acting expeditiously to resolve the large number of complex issues raised in [the UTex] arbitration."<sup>6</sup>

**A. *UTex's allegation that the PUCT might decide it lacks authority to resolve all issues is premature.*** (Responds to Reconsideration Points 1, 5 and 6.)

The PUCT staff arbitrators have issued a proposal for award. Exceptions to the proposal have been filed, by both UTex and AT&T, in accordance with PUCT arbitration rules.<sup>7</sup> The arbitrators will now issue a final award.<sup>8</sup> Once there is a final award, UTEX and/or AT&T may ask the PUCT Commissioners to reconsider it, and they could decide to change it.<sup>9</sup> Until this process is completed, UTex's argument that the arbitration might not resolve all the issues is obviously premature.

**B. *UTex mischaracterizes AT&T's exceptions to the proposal for award, and there is no basis to assume that the final award will not resolve all issues in the arbitration.*** (Responds to Reconsideration Point 1, 5 and 6.)

Even if it were not premature, the primary argument UTex presents in its motion is simply wrong. AT&T does not contend in its exceptions to the proposal for award that the

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<sup>6</sup> October 2010 Order at 3.

<sup>7</sup> Under PUCT rules, the parties have ten working days from the proposal for award's issuance to file exceptions to it with the arbitrators, 16 TEX. ADMIN. CODE § 21.95(t)(2).

<sup>8</sup> The arbitrators must endeavor to issue an arbitration award within ten days. 16 TEX. ADMIN. CODE § 21.95(t)(3).

<sup>9</sup> The parties may ask the PUCT to reconsider the award by filing a motion within twenty days of the award. 16 TEX. ADMIN. CODE § 21.75(b)(2). The motion is denied if, within five working days of its filing, no PUCT Commissioner votes to place the motion on the agenda for an open meeting. 16 TEX. ADMIN. CODE § 21.75(b)(5)(A). If placed on the open meeting agenda, responses are due within ten days of the filing of the motion. 16 TEX. ADMIN. CODE § 21.75(b)(2). After any motions for reconsideration are decided, PUCT arbitration rules require the parties to file a conforming agreement for approval. See 16 TEX. ADMIN. CODE § 21.99(e).

PUCT lacks the authority to resolve some of the issues in the arbitration. Instead, AT&T argues that the arbitrators' proposed terms are not consistent with federal law and the relevant Commission authority. This is obvious from a review of AT&T's exceptions.<sup>10</sup>

UTex says that the PUCT may find it lacks the authority to arbitrate certain terms for UTex's interconnection agreement and asserts that only the Commission may have the authority to address these particular issues. But in its October 2009 order denying UTex's original petition for preemption, the Commission charged the PUCT with completing the arbitration in accordance with existing law — that is, the FTA and the relevant Commission authority. The PUCT is applying the same law that the Commission itself would apply if it were arbitrating the agreement. There is no real question as to the PUCT's authority to address all the issues.

***C. If ultimately unhappy with the terms the PUCT arbitrates, UTex's remedy is to seek review in federal court, not to ask the Commission to arbitrate the agreement again.***

Even if the PUCT erroneously denied UTex contract terms, that would not constitute a state commission failure to act justifying preemption.<sup>11</sup>

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<sup>10</sup> E.g., Tex. Util. Comm'n, *Petition of UTEX Communications Corporation for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act and PURA for Rates, Terms, and Conditions of Interconnection Agreement with Southwestern Bell Telephone Company*, Docket 26381 (Oct. 7, 2010) (AT&T's Exceptions to the Arbitrators' Proposal for Award) at 3 ("In resolving the Enhanced Service Provider ("ESP") traffic issues in this arbitration, the Arbitrators have created a compensation system that has no precedent in either FCC statutes, decisions, or rules or [PUCT] decisions implementing that federal law."), 5 ("The terms and conditions under which AT&T Texas is required to provide 500 service to UTEX or to UTEX customers is governed by the AT&T Texas federal access tariff, and the Texas Commission has no authority to set a different compensation system in a § 251/252 interconnection agreement."). UTex attached AT&T's exceptions to its motion for reconsideration.

<sup>11</sup> 47 U.S.C. § 252(e)(5) provides:



If UTex were right, then any time a party did not receive a requested contract term in a state commission arbitration the Commission would have to preempt and arbitrate the entire dispute all over again — even after a state’s completion of the arbitration. This is contrary to the plain language of the FTA. Even if the state commission did not award a contract term that the party was entitled to under federal law, the state commission has not failed to act under 47 U.S.C. § 252(e)(5).

FTA Section 252(e)(6) vests the federal courts with the power to review state commission determinations, such as failing to require a requested contract provision. If the state commission acts, the remedy is to seek review in federal court:

In any case in which the state commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

47 U.S.C. § 252(e)(6). UTEX’s argument would effectively shift that responsibility to the Commission.

UTex’s newest argument for preemption is a transparent attempted “end run” around this judicial review provision. But the FTA does not allow this. The FTA does not give UTex the option to choose whether to seek review of a state commission-arbitrated agreement at the

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(5) COMMISSION TO ACT IF STATE WILL NOT ACT.— If a state commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the commission shall issue an order preempting the State commission’s jurisdiction of that proceeding or matter within 90 ninety days of being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

47 U.S.C. § 252(e)(5).

Commission or in federal court. Nor does the FTA give any party to an arbitration a right to a second bite at the apple — that is, to ask the Commission to arbitrate the agreement *again* — if it is displeased with the state commission’s determination. Instead, an aggrieved party’s remedy is to go to federal court, which is charged with determining whether the state commission determinations are consistent with federal law, including the Commission’s own rules and decisions.

***D. UTex’s allegations that AT&T is attempting to delay resolution of the arbitration do not suggest the PUCT is not acting to complete it.*** (Responds to Reconsideration Point 2.)

Much of UTex’s motion for reconsideration details AT&T’s alleged misconduct in the arbitration. (See UTex Motion for Reconsideration at 7 to 16.) These allegations are plainly irrelevant to the only issue before the Commission on UTex’s renewed petition for preemption: whether the PUCT is acting to carry out its responsibility to complete the arbitration. Even assuming AT&T were seeking to delay completion of the arbitration, there is no reason to conclude that its alleged obstructionist conduct (such as failing to submit appropriate contract language required by the proposal for award, as UTex contends) will prevent the PUCT arbitrators from issuing a final award as soon as possible. Nor should it prevent the PUCT Commissioners from deciding any motion for reconsideration of that award. There are simply no grounds to assume that the PUCT will not timely resolve the issues.

***E. UTex’s arguments regarding the statutory timeline do not suggest that the PUCT is not acting to carry out its responsibility.*** (Responds to Reconsideration Points 3 and 4.)

Here, UTex just reurges a point that the Commission properly rejected in its October 2010 order denying Utex’s renewed petition: that the clock has run out, and therefore the Commission must preempt. In that order, the Commission explained that it did not set a firm nine-month deadline for completion of the arbitration in its 2009 order denying UTex’s original preemption petition. Indeed, the October 2010 order notes that some of the most recent delay was the fault of the parties, not the arbitrators.<sup>12</sup> The PUCT’s previous filings in this proceeding have described the difficult history of the UTEX arbitration, which will not be repeated here.<sup>13</sup> Certainly, under the circumstances, UTex’s alleged 2005 deadline — over three years before UTex filed its first petition for preemption — could not be applicable. Nor did the Commission’s October 2010 order establish any exemption from the FTA statutory timeframe for “hard,” “unsettled,” or “complicated” questions.

**III. Conclusion**

For the foregoing reasons, UTex’s motion for reconsideration of the October 2010 order denying its renewed petition for preemption should be denied.

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<sup>12</sup> October 2010 Order at 3 n. 18 (“Also, as the Bureau noted in the *Order Denying UTEX Petition for Preemption*, it again appears that up this point, at least some of the delay has been caused by the parties to the arbitration. *See Order Denying UTEX Petition for Preemption*, 24 FCC Rcd. at 12576-77. For example, UTex and AT&T were unable to file joint decision point lists until several weeks after the arbitrators’ established deadline. *See* PUCT Comments at 7 and Exh. A.”)

<sup>13</sup> *See, e.g.,* Public Utility Commission of Texas’ Response to Petition of UTEX Communications Corporation for Preemption Under 47 U.S.C. § 252(e), WC Docket No. 09-134, at 2-4 and Ex. A (filed Aug. 11, 2009).

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## Certificate of Service

I certify that a true and correct copy of the foregoing Public Utility Commission of Texas' Opposition to Utex Communications Corporation's Motion for Reconsideration has been sent to the parties below by first class mail, and email if indicated, on the 16<sup>th</sup> day of November, 2010.

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